

MEMORANDUM OF LAW

DATE: January 5, 1989

TO: Councilman Ron Roberts

FROM: City Attorney

SUBJECT: Vacating Public Streets - Legal Alternatives of
the City Council in Connection with Such
Proposed Vacations - Witherby Street -
Continued Item From Council Docket of 12/13/88
- Item 340

On December 13, 1988, the matter of the proposed summary vacation of a portion of Witherby Street was before the Council. It is our understanding that the fact situation involves a presently unimproved street right-of-way across a lot which now is developed with two residences.

Vacating the street would result in additional square footage to the lot and allow potential development of three units. Some discussion occurred at the Council meeting relating to the potential for vacating the street with a condition that the additional square footage to the lot resulting from the street vacation could not, in the future, be taken into consideration in determining the number of units allowable on the lot.

APPLICABLE STATUTORY PROVISIONS

As a general rule, easements for public street purposes are similar to easements for other purposes, such as, sewer, water, open space and general utility easements. Such easements are granted to the City for specific functions and all such easements are, in effect, held "in trust" for the public's benefit and an easement may not be vacated or abandoned without a determination by the City Council that the easement is no longer needed. See Section 8300 et seq. of the Streets and Highways Code which is known as the "Public Streets, Highways, and Service Easements Vacation Law."

The distinction between street easements and other easements is that street easements are generally considered to include not

only the right of the public to travel on such easements, but are also considered to include the right to install and maintain sanitary sewers, storm drains, various pipelines, telephone and telegraph lines, railroad lines, and electrical energy, petroleum and water lines. Easements for any or all of the above purposes may be "reserved" when a street is vacated. Section 8340.

Section 8351 specifies that, except as provided in Section

8340, upon the vacation of a street title to the property previously subject to the easement is thereafter free from the easement. A street may only be vacated if the City Council finds after a hearing that the street "is unnecessary for present or prospective public use." Section 8324.

DISCUSSION

As noted above, there is no provision in the law relating to vacating streets which authorizes the City Council to consider the number of units which can be constructed on property prior to and after the proposed street vacation. As you know, the number of units allowed to be constructed on property is controlled through zoning and the City's general plan. The question before the City Council is merely: Is the street needed or is the street not needed for present or prospective public use?

The City Council has extremely broad latitude in determining not to vacate a street in that it is impossible to determine with absolute certainty that presently unused and undeveloped street right-of-way may not, at some time in the future, be needed for various street purposes.

To our knowledge, no California court has overturned or held invalid a city council's determination not to vacate a public street. On the other hand, there is nothing in the law which allows a city council to condition a street vacation upon a promise by a property owner not to develop property in accordance with applicable zoning and planning regulations.

Conversely, the City Council has the authority, as stated above, to reserve various utility easements over the entire street area to be vacated and, in addition, there is nothing in the law to preclude a property owner, for example, from granting to the City an open space easement over property presently subject to a public street easement, assuming such a grant of easement is given freely. However, even if the City were to reserve utility easements or acquire an open space easement on the property subject to the street easement, such fact would not reduce the total square footage of the lot in determining the

number of units which could legally be placed on the lot, since such easements merely preclude development on the portion of the property subject to such easements.

Some thought was given to the concept of the City's entering into an agreement with the owner of the subject property pursuant to which the owner would agree not to construct more than two units on the lot. This concept, however, has a variety of problems. First, the consideration for such agreement could not be the vacating of the street since, as stated above, there is no

authorization in the law for a city council to require or accept consideration for making a finding that a public street is not needed for public street purposes. Second, since the City is not apparently the owner of an adjacent parcel to be benefitted by such agreement to limit construction, such an agreement would not meet the requirements of Section 1460 et seq. of the Civil Code defining the covenants which can "run with the land" and be binding upon subsequent property owners. Once again, however, there is nothing in the law which precludes the owner of the subject property from entering into a binding covenant which could run with the land with an adjacent property owner. Such an agreement would have to conform to the requirements of Section 1460 et seq. The City Council could not, of course, take any such agreement into consideration in determining whether a street should or should not be vacated and, since the City would not be a party to such agreement, the City could not prevent the parties from amending or terminating the agreement at any time.

In summary, the state laws provide for the process to vacate a public street. The law allows the City Council to vacate a street only if the Council determines, after a hearing, that the street is not needed for present or prospective street purposes. There is no provision in the law which allows the City Council to "sell" the public street easement which is held in trust for the public, whether such a "sale" is for money or for other consideration, nor is there anything in the law which allows the City Council to condition the vacation of unneeded right-of-way upon a property owner's covenant or agreement not to develop the property to the full extent authorized by applicable zoning and planning regulations.

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By

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